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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 94

JOHN A. ACREE, *et al.*,

Petitioners,

versus

AIR LINE PILOTS ASSOCIATION and EASTERN AIR LINES, INC.,

Respondents.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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JOHN A. ACREE, *et al.*,

Petitioners,

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AIR LINE PILOTS ASSOCIATION and EASTERN AIR LINES, INC.,

Respondents.

BRIEF OF EASTERN AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of Case

The petition for writ of certiorari, seeking review of the judgment of the Court of Appeals for the Fifth Circuit which affirmed the District Court's dismissal of the complaint, represents the latest step (and the only still pending step) in a long and involved series of judicial and administrative proceedings arising out of a strike by petitioners (hereinafter called plaintiffs) and the other flight engineer employees of respondent Eastern Air Lines, Inc. (Eastern) in the summer of 1962.[1]

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[1] *Flight Engineers, EAL Chapter* v. *Eastern Air Lines, Inc.*, 208 F. Supp. 182 (S.D.N.Y. 1962), *affirmed per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U.S. 945 (1963); and the four opinions in Civil Action No. 2900 in the Southern District of New York in which both Eastern and ALPA were defendants: *Flight*

The named plaintiffs brought this action as a class action on behalf of all persons employed by Eastern on June 22, 1962 in the classification of flight engineers. (Paragraph 1 of Complaint, R. 1-2). Plaintiffs alleged a conspiracy between defendants (respondents) Eastern and the Air Line Pilots Association (ALPA) to "oust plaintiffs from their jobs and careers as professional Flight Engineers, and to replace them with unemployed members of ALPA, in order to insure ALPA members against present and future unemployment." (Paragraph 39 of Complaint; R. 16). Plaintiffs alleged that the conspiracy was to be effected by either (a) forcing the flight engineers to agree to accept pilot qualifications which would enable ALPA to call for a "mixed" representation election where the numerical strength of ALPA members would enable them to oust the then-certified representative of the flight engineers, Flight Engineers International Association, EAL Chapter (FEIA), or (b) provoking or forcing plaintiffs into a strike, whereupon Eastern would replace plaintiffs with unemployed members of ALPA. (Paragraphs 39-60 of Complaint; R. 16-22). Plaintiffs further alleged that the conspiracy was successful in that they were provoked into a strike and were replaced. (Paragraphs 63-64 of Complaint, R. 23). According to the plaintiffs, these alleged

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Engineers v. *Eastern*, 45 CCH Labor Cases 17,814 (S.D.N.Y. 1962), *affirmed*, 311 F. 2d 745 (2d Cir. 1962), *cert. denied*, 373 U.S. 924 (1963); 243 F. Supp. 701 (S.D.N.Y. 1965), *affirmed*, 359 F. 2d 303 (2d Cir. 1966); *Flight Engineers* v. *Civil Aeronautics Board*, 332 F. 2d 312 (D.C. Cir. 1964); *Flight Engineers, EAL Chapter* v. *NMB*, 338 F. 2d 280 (D.C. Cir. 1964).

The opinion of the United States District Court for the Southern District of New York in *Flight Engineers* v. *Eastern Air Lines, Inc.*, 243 F. Supp. 701 (S.D.N.Y. 1965) sets forth the long history of this labor dispute from 1957 through September 11, 1964. The Second Circuit in *Flight Engineers* v. *Eastern Air Lines, Inc.*, 359 F. 2d 303 (1966) detailed the long series of court proceedings and proceedings before the Civil Aeronautics Board and the National Mediation Board that followed the strike.

acts constituted "hostile, invidious and unlawful discrimination." (Paragraph 77 of the Complaint; R. 26-27).

For relief the plaintiffs requested (a) judgment against ALPA in the total amount of $29,090,100; (b) reinstatement of plaintiffs to their employment by Eastern; (c) an injunction restraining defendants from engaging in any further acts of hostile discrimination against plaintiffs; and (d) a declaration that the past conduct of defendants was unlawful.

Eastern and ALPA filed motions to dismiss the complaint (R. 205 and 242) and on January 25, 1967, after considering briefs and oral argument, the District Court granted such motions and entered judgment for defendants Eastern and ALPA (R. 416-422).

After oral argument on the motions to dismiss and shortly before the District Court granted those motions, plaintiffs filed an amendment (R. 391-402) of the complaint which purported to change the "conspiracy" theory to one predicated on "economic coercion and threats of reprisal" (R. 394) by ALPA which forced Eastern to yield to ALPA's demands. Since plaintiffs alleged that ALPA's "threats" and Eastern's "acquiescence" produced the same allegedly unlawful result which ensued from the "conspiracy", the gist of the action was not changed by the proffered amendment.

The judgment of the District Court was on the grounds that (1) the Court had no jurisdiction—following the decision of the Second Circuit in *Flight Engineers* v. *Eastern*, 359 F. 2d 303 (1966) on this point, and (2) this decision by the Second Circuit constituted *res judicata* on the issues raised by the instant complaint.

On appeal the Fifth Circuit affirmed the second point and did not reach the first point. The Fifth Circuit reasoned

that the same cause of action was involved in both the New York case and the instant case and that the plaintiffs in both actions were either identical or in privity.

Questions Presented

Eastern believes that the questions raised by the petition for writ of certiorari are:

(1) Are plaintiffs bound by *res judicata* by reason of the prior proceedings initiated by their collective bargaining representative (FEIA) in which the same requests for relief and the same issues were presented and decided by other tribunals contrary to the contentions of plaintiffs?

(2) Did the District Court have jurisdiction to decide issues which directly involve "jurisdictional and representation disputes" within the exclusive jurisdiction of the National Mediation Board and which, if decided by the Court as plaintiffs request, would result in a collateral attack on, and nullification of, that Board's certification of ALPA as the collective bargaining representative of Eastern's employees?

Summary of Argument

(1) This action is barred by *res judicata*. Plaintiffs, through their collective bargaining representative (FEIA), litigated essentially the same issues (alleged "conspiracy" and other unlawful conduct by ALPA and Eastern resulting in alleged unlawful discharge of Eastern's flight engineers) and sought the same relief (reinstatement of the flight engineers and damages for loss of wages) in the Federal courts in New York. The same individuals may

not relitigate the same issues and demand the same relief in this action simply by utilizing a different representative in a "class action".

(2) In any event, the principles which impelled the Federal courts in New York to dismiss FEIA's action require dismissal of this action also. Either reinstatement of the 500 striking flight engineers or award of the enormous damages which they sought would fly "in the teeth" of the National Mediation Board's certification of ALPA as the representative of Eastern's flight engineers after the strike. There is no merit in the contention of plaintiffs that the doctrine of *Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952) applies to this case to take it out of the exclusive jurisdiction of the National Mediation Board over representational disputes.

(3) Plaintiffs have set forth none of the traditional "considerations governing review on certiorari" as spelled out in this Court's Rule 19. There is no "conflict" between the Fifth Circuit decision on *res judicata* and any decision of this Court or any Court of Appeals, and there is no other basis for the grant of the writ in this case.

Argument

I. *This Action Is Barred By Res Judicata.*

The allegations of the plaintiffs, which can be summarized as claiming an unlawful conspiracy between Eastern and ALPA, or economic coercion and threats of reprisal by ALPA to which Eastern unlawfully capitulated, and other unlawful conduct by Eastern and ALPA and subsequent bad faith dealing with plaintiffs' representative by Eastern, have been before the Federal Courts a number

of times. Each time the decision has been that there was no conspiracy or other unlawful conduct and that Eastern did not deal with the FEIA in bad faith. In addition these decisions have conclusively held that the courts have no jurisdiction over the subject matter. (See cases cited in Footnote 1).

It is Eastern's contention, and the courts below concluded, that these decisions, particularly the decision by the Second Circuit at 359 F. 2d 303 (1966), constitute *res judicata* with respect to the allegations and requests for relief in the instant action.

The close parallel between this action and the one disposed of by the Federal Courts in New York is apparent from the following summary by the Court of Appeals for the Second Circuit:

> "In the summer of 1962 FEIA brought suit in the Southern District of New York, seeking a preliminary injunction against Eastern on the grounds that Eastern had failed to bargain as required by the Railway Labor Act, and had bargained improperly by withdrawing earlier offers to the union and by writing to the individual employees. The district court denied the relief requested on the grounds that FEIA had shown no clear and convincing evidence of unfair labor practices and had not demonstrated a reasonable probability of success after trial. This court affirmed on the opinion below. 208 F. Supp. 182 (S.D.N.Y.), *aff'd per curiam*, 307 F. 2d 510 (2d Cir. 1962), *cert. denied*, 372 U. S. 945 (1963).
>
> "FEIA started the present suit against Eastern and ALPA in the Southern District of New York on August 21, 1962, requesting that the defendants be preliminarily enjoined from alleged violations of the Railway

Labor Act. The district court found on the merits that the procedures for bargaining under the Act had been exhausted so that the parties were free to resort to economic self-help; that Eastern had bargained in good faith with FEIA, and that Eastern had not conspired with ALPA against FEIA. The court denied the request for a preliminary injunction on the grounds that FEIA had not shown a reasonable chance of success at a full trial. 45 CCH Lab. Cas. Paragraph 17,814 (1962). This court affirmed on the ground that since the case involved problems of representation and problems of jurisdiction between labor unions, the district court was without jurisdiction to grant the relief which the plaintiff sought. 311 F. 2d 745 (2d Cir.), *cert. denied*, 373 U. S. 924 (1963). In February 1964 FEIA filed an amended or supplemental complaint against Eastern and ALPA, requesting not only an injunction against Eastern ordering it to recognize FEIA as the exclusive bargaining representative of the flight engineers, but also a declaratory judgment declaring that the many agreements between Eastern and ALPA (November 12, 1958, January 1, 1959, July 20, 1962, August 3, 1962, and August 6, 1962) were void and unenforceable; a mandatory injunction directing that Eastern reinstate the striking FEIA flight engineers without prejudice, 'ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers'; and a judgment for damages of $11,500,000, together with a similar sum 'as exemplary damages.'

"Both defendants moved for summary judgment dismissing the amended complaint on the ground that the court was without jurisdiction to grant the relief requested. The district court granted the defendants' mo-

tions, partly on the ground that there was no evidence of violations of the act and partly on the ground that the district court lacked jurisdiction of the subject matter. 243 F. Supp. 701 (S. D. N. Y. 1965)."

The plaintiffs in their petition for certiorari do not contend that the District Court in the instant case was incorrect in stating:

> "The basis of the plaintiffs' complaint is that the defendants conspired to discharge them and that such discharge was wrongful.
>
> "This complaint was dealt with and determined to be without merit in several decisions by the federal judiciary. See *FEIA, EAL Chapter* v. *Eastern Air Lines*, 208 F. Supp. 182 (1962), *aff'd. per curiam* 307 F. 2d 510 (1962), *cert. den.* 372 U.S. 945 (1963); *FEIA* v. *Eastern Air Lines, Inc.*, 243 F. Supp. 701 (1965), *aff'd* 359 F. 2d 303 (1966). . . ."

Likewise, plaintiffs do not take issue with the Fifth Circuit's conclusion that:

> "Thus the cause of action relied on in the Second Circuit litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. The complaints were prepared by different lawyers. But essentially they are the same. What difference exists is in form, and we have long held that in determining *res judicata* it is the substance of the action that counts. 'What is important and determinative now as to the identity of causes of action, is not identity of form, but of grounds.' *Wilson Cypress Co.* v. *Atlantic Coast Line R. Co.*, 5 Cir., 109 F. 2d 623, 627, *cert. denied*, 310 U.S. 653 (1940). . . ."

> ". . . Under the plain allegations of the two complaints, other than Chinese copies it would be difficult to find causes of action and claims for relief more similar than those asserted in the New York action and those asserted here."

Rather, the plaintiffs contend that despite the fact that the factual allegations are the same and the requests for relief are the same, *res judicata* does not apply because there was no privity between the plaintiffs in the New York actions and the plaintiffs in the Georgia action.

Plaintiffs assert (1) that the individual plaintiffs were not parties to the New York litigation and (2) that the only issues in the New York litigation related to FEIA *as FEIA*. As can be plainly seen from the decision of the Court of Appeals for the Second Circuit, these contentions of plaintiffs are incorrect. The fact is that the Court of Appeals assumed that FEIA was the representative of all individual flight engineer strikers and had standing to seek, and was seeking, reinstatement and damages for them. That Court further specifically ruled that such individuals *could not* be *reinstated* or *awarded damages* without unlawfully attacking the Mediation Board's certification of ALPA—a matter beyond the Court's jurisdiction.

The identity of parties (FEIA and the individual striking flight engineers) is apparent. Under the Railway Labor Act, all dealings are between the "carrier or carriers and its or their employees" through their "representatives designated and authorized". See Section 2, Second, Third, and Fourth and other provisions throughout the Railway Labor Act, 45 U.S.C. 151 *et seq.* Thus, whenever FEIA spoke, it necessarily spoke for the individual members of the union. In its amended New York complaint it alleged (paragraph 2) that it was "a voluntary unincorporated

labor organization duly certified, designated and authorized under the Act as the collective bargaining representative of all employees of defendant Eastern Air Lines, Inc. in the class or craft of Flight Engineers." Such an unincorporated association *is* the members thereof and the members *are* the association. Without them there would be no union. Clearly FEIA sued only as "the collective bargaining representative" of plaintiffs and the other striking flight engineers.

When the case reached the Court of Appeals, FEIA in effect abandoned all claims of the union *qua* union saying (page 23 of its Brief):

> "However, at issue now are the employment rights of some 500 flight engineers who, EAL Chapter claims, have been wrongfully discharged from employment and discriminatorily refused reinstatement by Eastern for reasons quite apart from those before the Court in the prior appeal. The court may leave undisturbed the prior decision, and yet grant the relief requested by EAL Chapter to remedy the wrongs committed against the 500 individuals who now seek reinstatement. The prior appeal had nothing whatsoever to do with the reemployment rights of these individuals, and the opinion of this Court on that appeal does not, indeed it cannot, foreclose the presentation of these new claims. For if it were otherwise, these 500 individuals represented by their certified bargaining agent would be without any remedy whatsoever, a result impossible to square with our jurisprudential system."

It should be noted in this connection that the plaintiff in the New York actions was the Flight Engineers International Association, *EAL Chapter*, an organization composed solely of, limited to and controlled by flight engineer

employees of Eastern—precisely the same class that brought this action.

In the New York litigation FEIA did not seek to vindicate "institutional rights" of the union. The FEIA contended (1) that the individual flight engineers had a right to be represented by the union of their choice and that the flight engineer employees had chosen the FEIA; and (2) that the individual employees had a right to reinstatement and damages for lost compensation and that they could wage their battle jointly through their representative. Such representation—giving the individual employees additional strength through joint representation and action—is one of the basic purposes for which unions exist.

It is true that actions for wrongful discharge—in their Railway Labor Act connotation—are normally brought by the individual rather than any collective bargaining representative. But these are actions brought under state law and are based on the premise that the individual has accepted the fact that his employment has terminated. *Koppal* v. *Transcontinental & Western Air, Inc.*, 345 U.S. 653 (1953); *Moore* v. *Illinois Central R.R.*, 312 U.S. 630 (1941). Acceptance of discharge is also acceptance of the fact that the individual is no longer represented by the collective bargaining representative and is no longer a part of the class represented by the bargaining agent.

This is in sharp contrast with both the New York actions and the instant action. In both actions the plaintiffs sought reinstatement of the flight engineers that had been replaced—which takes both actions out of the wrongful discharge category as it is known under the Railway Labor Act. Both actions were brought under federal rather than state law. Thus, both actions are clearly of the type in which traditionally the collective bargaining agent has represented the class.

This is not to say that the collective bargaining agent is the sole party that may represent the class. It is only to say that the collective bargaining agent is a proper party to represent the class. The class may decide to use its collective bargaining agent or to use named individual representatives, but it cannot do both.

From the above, it is evident that plaintiffs err when they say (petition page 15, and generally pages 12-17) ". . . the thrust of FEIA's said prior litigation was essentially directed solely to the end of protecting FEIA's claimed institutional recognitional rights. . . ." [2]

For even further demonstration that FEIA was presenting the individual reinstatement claims of the strikers, see pages 42-54 of FEIA's Brief to the Second Circuit as reproduced in the record of this case (R. 380-391).

In short, by the time the New York litigation reached the Second Circuit for final decision in early 1966, the principal issue—if not the only one—was the very issue which plaintiffs now urge upon this Court, *i.e.*, the claim that the individual strikers were entitled to reinstatement and damages because their jobs had been unlawfully seized as a result of ALPA's "raid" and Eastern's acquiescence in ALPA's "crew complement" demand.

Plaintiffs rely on statements by the New York District Court that the remedy of reinstatement and damages for wrongful discharge "is available only to the individual employees and not to FEIA" and that "FEIA is seeking global damages for alleged wrong to it, and not individual

[2] Plaintiffs also argue that this is shown by the failure of the FEIA to rely on *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944) and *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952). A more logical explanation of the FEIA's failure to cite and rely on these cases is that they were deemed inapplicable—as we shall demonstrate they are. (See Part II of this Brief).

damages for such of its members who may have been wrongfully discharged." Three further comments are sufficient:

(1) By the time the case reached the Second Circuit, FEIA's claim was almost exclusively limited to the individual rights of the strikers, as demonstrated above.

(2) The Second Circuit did not suggest a lack of standing by FEIA to present the individual claims, but met the reinstatement and damages issues head on as being presented properly by plaintiffs' representative.

(3) After making the preliminary statement quoted by plaintiffs, the District Court held:

> "Moreover, any action for wrongful discharge must be founded on a violation of the Act or of an agreement entered into under the Act in force at the time the discharge occurred. There was of course the agreement between Eastern and FEIA, dated December 31, 1958, as to which both sides served notices of modification in 1960. The events from that time until the strike on June 23, 1962 have already been recited. For the reasons cogently stated by Judge Feinberg and Judge Levet, once the strike had been called and paralyzed the operations of Eastern, the agreement was no longer in force and Eastern was entitled to take unilateral action or self-help in order to restore the vital public service of its air line. As stated by Judge Levet:
>
> > 'Based on the record before me, I find for the same reasons as did Judge Feinberg, that as between the plaintiff [FEIA] and Eastern the procedures of the Act for the settlement of this dispute have been exhausted and that the parties were free to resort to self-help.'
>
> "Judge Feinberg stated that under the circumstances Eastern could hire and train co-pilots to replace the

strikers and, in so doing, it did not exceed the boundaries of lawful 'self-help.' *Flight Engineers* v. *Eastern Air Lines, Inc.*, 208 F. Supp. at 194. Moreover, the Mediation Board in its brief to the Court of Appeals for the District of Columbia, in *Flight Engineers Int'l Ass'n, EAL Chapter* v. *National Mediation Board*, 338 F. 2d 280, stated, at p. 32,

> 'The Board determined that FEIA's strike against Eastern was an economic strike and that Eastern therefore had a right to permanently replace these strikers . . . *Cf. NLRB* v. *McKay Radio & Tel. Co.*, 304 U. S. 333.' "

The only difference between the instant case and the prior cases is that the instant action is brought by five individuals as representatives of the class rather than by the FEIA as the representative of this same class. Both FEIA and plaintiffs have claimed to represent all of Eastern's flight engineer employees. The net effect is that the same group of claimants (Eastern's former flight engineers) is making the same claims (alleged violations of the Railway Labor Act) and seeking the same relief (reinstatement, injunction and damages). Only the nominal representative of the group, the counsel of record and the forum have been changed. It is settled law that where one representative of a class brings an action the result is *res judicata* as to all members of the class. In *Hansberry* v. *Lee*, 311 U. S. 32 (1940) this Court said:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present

> as parties . . . or where the interest of the members of the class, some of whom are present as parties is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter. . . ."

See also *King* v. *International Union of Operating Engineers*, 250 P. 2d 11 (Calif. District Court of Appeals, 1952).

In *Hixon* v. *Kansas City*, 239 S. W. 2d 341 (Sup. Ct. Mo. 1951) the court pointed out that *res judicata* operates even though the parties are not the same in the second case, where the interest represented in both suits is identical. The Court held:

> "Respondents contend that the Taylor case is not res adjudicata in this case because different parties are involved. They make this contention for the reason that the class represented by the intervenors in that case was limited to residents of the Clay County area while the class represented in this case resides both in Clay and Jackson County . . .
>
> ". . . Under similar circumstances we held that the rule of 'privities' of parties applied and that the parties in the second suit whose interests were the same as the parties to the first suit were bound by the judgment of the first suit in the case of *Drainage District No. 1 Reformed* v. *Mathews, Mo. Supp.*, 234 S. W. 2d 567, loc. cit. 574. In ruling that case we said:
>
> 'The doctrine [res adjudicata] is applicable if (as here) the interest of the represented and the representatives are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them. The rule of

> *Powell* v. *City of Joplin,* supra. [335 No. 562, 73 S. W. 2d 408], is not opposed to the fundamental principle that a stranger to a cause and to its subject matter is not bound by a judgment as to which he had no opportunity to be heard. But in the instant circumstances under the applicable principles and the broad policy of the law to bring litigation to an end the res judicata rule must be applied. And under the principles of that rule "privity" depends more upon the relation of the parties to the subject matter than upon their connection as parties with or any activity in the former litigation. Generally speaking, privies are those legally represented at the trial. Privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right; and where this identity of interest is found to exist, all are alike concluded and bound by the judgment . . .'"

Obviously the interest of the FEIA in prosecuting the prior suits is identical with the interest of the named parties and class in the instant suit. In the prior proceedings, as in the instant proceedings, reinstatement of the members of the class and damages for their termination were demanded. The identical benefit would have flowed to the members of the class had the FEIA been successful as would flow to the same class if the instant plaintiffs were successful. Substantially identical charges of wrongdoing were brought by the FEIA in the prior suits as are set out in the instant action.

Nor does the fact that the Second Circuit's decisions were based on lack of jurisdiction over the subject matter detract from the binding effect of the decisions. In *Estevez* v. *Nabers,* 219 F. 2d 321 (1955) the Fifth Circuit held:

"The first action having held the complaint was defective in failing to allege a controversy of a justiciable nature, a jurisdictional requirement under Article III of the Constitution, we may not consider the correctness of that decision on the facts there alleged . . .

"Plaintiff insists that the first judgment was not 'on the merits' and should not bar this subsequent action. The dismissal of the first action can be ascribed to a lack of jurisdiction or to the absence of a substantive claim; actually the ground of dismissal amounted to both of these. But even if regarded as a decision not on the merits, the first action precludes a new adjudication of the question actually decided, although it does not 'bar the cause of action . . .' The Restatement calls this effect of a non-merits judgment 'direct estoppel.' Restatement, Judgments Section 49, Comment b. This terminological distinction seems valuable to show that such a judgment does not bar the cause of action. But whether the first decision was on the merits or not is not important here, since we regard the two actions as not materially different, and the questions actually decided in the first action disposes of the present one as well."

See also *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522 (1931); *Catholic Society, Etc.* v. *Madison County*, 74 F. 2d 848 (4th Cir. 1935).

Thus, it is clear that prior court decisions, involving this identical dispute and the same parties in interest, have held that the courts lack jurisdiction to grant reinstatement and damages and on the merits have held that there was no unlawful conduct by ALPA and Eastern. These decisions are *res judicata* and this action was properly dismissed.

II. *The District Court Lacked Jurisdiction Of the Subject Matter Of This Action.*

Even if the Court were to conclude that *res judicata* should not be applied to bar this action, the decisions cited and quoted above would require the conclusion that the District Court lacked jurisdiction of the subject matter for the same reasons that the FEIA action in the New York Federal courts was dismissed.

Here, as in the New York action, much of the complaint relates to "jurisdictional and representational disputes" between FEIA and ALPA—"disputes which, under the Railway Labor Act, are 'for non-curial treatment.' *FEIA* v. *Eastern Air Lines,* 311 F. 2d 745 at 748 (2d Cir.), *cert. denied,* 373 U. S. 924 (1963)."

Here, as in the New York action, the demand for reinstatement of the strikers flies "in the teeth of the board's certification" of ALPA. "Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants."

Here too, as in the New York action, "The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never care to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claims that the Railway Labor Act had been violated—a result which would clash with the evident congressional intent to have disputed questions of representation in an industry so

charged with the public interest disposed of rapidly." It is true that the damage claim in this case is directed to ALPA whereas the New York action sought damages from both defendants. However, the ultimate effect is the same since, if damages of such amounts could be obtained despite reliance on a Mediation Board certification, neither the certified union nor the employer would be willing to proceed until judicial immunity could be obtained.

The Court of Appeals for the Second Circuit clearly was on sound ground when it held that the award of damages by a court would represent an improper interference with the Mediation Board's certification function since, as the Supreme Court stated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, 246-247 (1959): ". . . regulation can be as fully exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." See also *Amazon Cotton Mill Co.* v. *Textile Workers Union*, 167 F. 2d 183 (4th Cir. 1948). It would be anomalous indeed if the Mediation Board's certification procedure, which may not be interfered with by injunctive process, or direct judicial review, could be circumvented collaterally by an award of damages against parties which rely on the Mediation Board's certification.

In short, all the reasons which impelled the Federal Courts in New York to dismiss the FEIA action apply with equal force to require dismissal of this action. Despite their disclaimer of intent to upset the certification of ALPA (Complaint Paragraph 82; R. 28), plaintiffs' demand for relief inevitably would constitute an improper collateral attack on that certification. Consequently, the District

Court lacked jurisdiction to consider the grant of such relief to plaintiffs.

Plaintiffs seek to give an aura of novelty and legitimacy to their complaint by asserting that ALPA and Eastern have engaged in "hostile, invidious, and unlawful discrimination" (*e.g.*, Complaint Paragraph 76; R. 26), with the apparent suggestion that ALPA as statutory collective bargaining representative of the plaintiffs violated a duty to represent the plaintiffs in good faith. However, this contention becomes patently spurious in light of the judicial determinations, quoted above, that all of plaintiffs had been permanently replaced by August 25, 1962, nearly two years before ALPA became the bargaining representative for flight engineer personnel.

Certainly, ALPA had no duty to represent *former* employees when it became the certified representative in June 1964. And, if plaintiffs are seeking to attack anything ALPA and Eastern did before June 1964 they are collaterally attacking the Mediation Board's certification of ALPA (contrary to their disclaimer in Paragraph 82 of the complaint) since that certification necessarily is predicated on the finding or assumption that ALPA attained majority representative status lawfully.

As appears from further court decisions, the National Mediation Board at the instance of FEIA investigated some of the charges which plaintiffs now seek to revive, and determined them adversely to plaintiffs' contentions. After investigation, the Mediation Board certificated ALPA and made clear that the charges of illegality which were leveled against Eastern and ALPA were unfounded.

The District Court and the Court of Appeals for the District of Columbia affirmed the Mediation Board's action

on the ground that the Mediation Board had complied with its statutory duty to "investigate" and was not required to grant FEIA the full-dress hearing which it had demanded. As the Court of Appeals stated (*Flight Engineers* v. *National Mediation Board,* 338 F. 2d 280 (D. C. Cir. 1964)):

> "As to appellant's contention based on our statement in *Flight Engineers' Int'l Ass'n* v. *CAB,* —— U. S. App. D. C. ——, 332 F. 2d 312, 316 (1964), that to the extent that the replacement issue related to eligibility of participants in the election, it could and properly should be determined by the Board, the record shows that the Board did investigate, hold hearings upon, and determine, the issue of eligibility, including a ruling on replacements. This was done in a manner which, under the limited character of our review, escapes judicial revision."

Moreover, in making charges of conspiracy and discrimination against ALPA and Eastern, plaintiffs are attempting to relitigate the very issues which were determined by the New York Federal Courts against them in the action brought by their representative, FEIA. For reasons stated in the first part of this brief, we submit that plaintiffs may not relitigate such issues.

Plaintiffs predicate their claim that the District Court had jurisdiction on the line of cases beginning with *Steele* v. *Louisville & Nashville R.R.,* 323 U. S. 192 (1944) and *Tunstall* v. *Locomotive Firemen and Enginemen,* 323 U. S. 210 (1944) which hold that a certified bargaining representative under the Railway Labor Act cannot misuse its power as *exclusive* representative of the employees in the class or craft by "hostile discrimination" against a minority

group (non-members of the union and, in virtually all cases, Negroes who are ineligible for membership in the union) of the *employees whom the union is required to represent.* Plaintiffs can not seriously believe that the principle of the *Steele* and *Tunstall* cases supports their action, since they are forced to admit that they were not at any time represented by ALPA, but they were, on the contrary, represented at all times by FEIA.

Since their case plainly does not fit *Steele* and *Tunstall,* plaintiffs are forced to rely on the unique rule of *Railroad Trainmen* v. *Howard,* 343 U. S. 768 (1952) which held that a large and strong union of white employees could not lawfully seize the jobs of Negro employees *performing the same job functions* (although classified under a different job title and represented by a separate Negro union) because such seizure was based *solely* on *race* and, however well qualified the Negro employees might be, "their color alone would disqualify them for the old job under its new name." The Court there concluded that "discriminations based on race alone are obviously irrelevant and invidious" and that Congress did not give the white union monopoly power in order to accomplish such a discrimination based solely on race.

While, as plaintiffs point out, *Steele* and *Tunstall* have been extended to cases involving discrimination on grounds other than race, *Howard* has not been so extended and it is *sui generis.* Whether *Howard* could be extended to other factual situations is questionable. In any event, it could not properly be extended to this case for the following among other reasons:

(1) In *Howard,* the Negro employees had the same job qualifications as the employees who took their jobs—the *only* difference was one of color which did not affect ability

to do the job. Here, there were substantial differences in job qualifications (pilot *versus* mechanic skills) and a genuine difference of opinion between the two unions as to which group was better qualified. Regardless of which union was right (and numerous Emergency Boards and Commissions appointed by the President concluded after study that pilot qualifications were preferable), the outcome was not based on considerations which were "obviously irrelevant and invidious."

(2) In *Howard*, the Negro employees had no opportunity to retain their jobs—their color alone prevented their employment and color could not be changed. Here, while job qualification requirements were changed as to jet aircraft, plaintiffs were given repeated opportunities to obtain such qualifications and retain their jobs on jets, and they had the further opportunity to retain their jobs on propeller aircraft without even obtaining pilot training. More than 100 of plaintiffs' fellow strikers took advantage of these opportunities by returning to work for Eastern and they have retained their jobs with preferential seniority rights. Plaintiffs spurned these opportunities and the loss of their jobs is therefore attributable to their own action, not that of Eastern or ALPA.

(3) In *Howard*, the Negro employees lost their jobs through a contract signed by the employer and another union without their consent and without any action on their part which contributed to the result. Here, plaintiffs lost their jobs solely because they went on strike, refused to return despite repeated urging by Eastern, the Secretary of Labor, other governmental officials and the President himself, and thus forced Eastern to replace them. By leaving their employment and causing themselves to be permanently replaced as a result of their strike and refusal

to return, plaintiffs have lost any right they might otherwise have to complain as to the new job qualifications established on jet aircraft.

(4) In this case, contrary to the situation in *Howard*, the claimed rights of plaintiffs have become an integral part of a jurisdictional dispute which has been litigated and relitigated before the National Mediation Board and the courts and, as conclusively held by the Court of Appeals for the Second Circuit, any effort to obtain reinstatement for plaintiffs amounts to an attack on the Mediation Board's certification of ALPA—a matter which is beyond the Court's jurisdiction.

(5) In this case, contrary to the situation in *Howard*, the claims of plaintiffs have been presented on their behalf by their collective bargaining representatives and have been conclusively decided contrary to their contentions.

(6) It is inconceivable that the principle of *Howard* would be extended to this type of economic battle between two unions over job jurisdiction. Such jurisdictional disputes are commonplace, as is generally known (*e.g.*, the construction industry), and as Congress has recognized in providing for resolution thereof under certain circumstances by the National Labor Relations Board pursuant to Section 10 (k) of the National Labor Relations Act (29 U.S.C. Sections 151-168). *Cf. Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261 (1964). This Court recently has further recognized the existence of such disputes over job assignment under the Railway Labor Act and has held that the disputes are to be settled by the Adjustment Boards created pursuant to the Railway Labor Act to the extent they are not "representation disputes" subject to the exclusive jurisdiction of the National Mediation Board.

Transportation-Communication Employees Union v. *Union Pacific R.R.*, 385 U. S. 157 (1966). If, as plaintiffs apparently contend, every "raid" by one union on the work jurisdiction of another were to be deemed a violation of the *Howard* principle, then the administrative agencies created by Congress to solve such disputes would become meaningless. If, as plaintiffs claim, the District Court has jurisdiction to determine whether ALPA improperly set out to "confiscate" the jobs of plaintiffs and whether ALPA then improperly forced Eastern to yield to its demand for additional pilot qualifications in the cockpit, and if the presence of such issues gives the Court further power to set aside Eastern's contracts with ALPA and to reinstate plaintiffs despite their lack of qualifications called for by the contracts, then the *Howard* decision would supersede the Railway Labor Act and the courts would be flooded with complaints seeking adjudication of job jurisdiction claims. And, of course, any such extension of *Howard* would amount to the negation of the principles of *Slocum* v. *Delaware L. & W. R.R.*, 339 U. S. 239 (1950) and also of *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943) and *General Committee* v. *Missouri-Kansas-Texas R.R.*, 320 U. S. 323 (1943).

It should be observed that, although the dispute between ALPA and the representatives of flight engineers over the required skills of the latter has erupted in many lawsuits, the *Howard* principle has not been invoked at any of the other air lines as a reason why ALPA's demands and supporting activities were unlawful. See for example *Flight Engineers* v. *Western Air Lines*, 43 CCH Lab. Cas. 17,064 (S. D. Cal. 1961); *Flight Engineers* v. *Continental Air Lines*, 297 F. 2d 397 (9th Cir. 1961); *Ruby* v. *American Airlines*, 323 F. 2d 248 (2d Cir. 1963), *cert. denied*, 375

U. S. 913 (1964); and *Northwest Airlines* v. *Machinists*, 185 F. Supp. 129 (D. Minn. 1960).

As noted above, plaintiffs have cited no case—and there is no case—in which the *Howard* principle has been extended beyond the precise situation presented in *Howard*—a seizure of jobs by a powerful white union at the expense of Negro employees, and with race as the *sole* basis for the discrimination.

In *Rumbaugh* v. *Winifrede R.R.*, 331 F. 2d 530 (4th Cir. 1964), *cert. denied, sub nom. Mine Workers* v. *Rumbaugh*, 379 U.S. 929 (1964), the Court firmly refused to extend *Howard* beyond the narrow situation there presented. In *Rumbaugh*, plaintiff complained that the employer and the union had conspired unlawfully to cause his discharge and that the union thus had violated its duty of fair representation within the rule of the *Howard* case. The Court of Appeals remanded the case to the District Court to determine whether or not Rumbaugh was within the class or craft represented by the union, saying:

> "Because the duty extends only to those employees whom the union is empowered to represent and because a union cannot be expected to look after the needs and demands of workers who are not covered by the collective bargaining agreement, an employee must establish, as part of his case, that he is a member of the designated bargaining unit.
>
> "Rumbaugh maintains that the union's duty of fair representation extends even further. His theory is that when discrimination is alleged, the complainant's status relative to the bargaining unit is immaterial. As support for this contention he cites *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U. S. 768 (1952). But in that case the Supreme Court rejected the proposi-

tion that *Steele's* prohibition against racial discrimination was inapplicable because the plaintiffs, train porters, were not designated as brakemen, the class of employees represented by the Brotherhood. The Court said that the central issue was the legality of the collective bargaining agreement which the white union had secured and which had the effect of requiring the carrier to eliminate all Negro train porters and substitute white brakemen in their places.

"We agree that the Court disregarded the artificial classification of train porters and brakemen in holding that the union violated its obligation of fair representation by entering into a racially discriminatory collective agreement. But this disregard was a facet of the patently illegal activity of the Brotherhood. It was the Court's view that the bargaining agent's obligation extended to all who worked in the craft, regardless of job classification. The Court did not hold that the duty of fair representation extends even to workers, such as supervisors, who are not regarded as 'employees' within the meaning of the Railway Labor Act.

"The union's position is that Rambaugh is not within the unit it represents, because he is a supervisor. It contends that exclusive jurisdiction to determine his employment classification (*i.e.*, whether he is a supervisor or a non-supervisor) lies either with the National Railroad Adjustment Board as a question arising 'out of the interpretation or application of agreements,' 45 U.S.C.A. § 153 First (i), or with the National Mediation Board as a dispute concerning craft classification or representation, 45 U.S.C.A. § 152 Ninth."

Since plaintiffs were not within the class or craft represented by ALPA and since ALPA's demands were not

based on race (or on any other factor unrelated to skills and job qualifications), the *Howard* rule does not apply and the District Court lacked jurisdiction for the reasons outlined above.

CONCLUSION

It will be observed that the petition for certiorari makes no effort to show that customary "considerations governing review on certiorari", as spelled out in this Court's Rule 19, call for grant of the writ in this case. The Fifth Circuit's decision rests solely on *res judicata;* yet the petition contains no suggestion that the decision below conflicts with a decision of this Court or any court of appeals involving *res judicata,* and certainly there is no suggestion of a departure from "the accepted and usual course of judicial proceedings."

On the point which the Fifth Circuit did *not* reach—jurisdiction to grant the requested relief—the petition seeks to demonstrate a conflict with this Court's decision in the *Howard* case. If there were a conflict, it would be with the *District* Court's decision but, as shown above, there is no conflict.

In any event, we have demonstrated in this brief (a) that all of plaintiffs' factual contentions have been thoroughly adjudicated at the instance of their authorized representative (FEIA) and they are therefore barred by *res judicata;* and (b) that even if not barred for that reason, the plaintiffs' claims for relief could not be granted for the very reasons which impelled the New York federal courts to dismiss the litigation prosecuted by FEIA.

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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